

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DEBRA HALL

Claimant

VS.

GUILFORD STREET INVESTMENTS, INC.)

Respondent

AND

ARGONAUT INSURANCE COMPANY

Insurance Carrier

Docket No. 1,041,244

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 8, 2010, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on August 3, 2010. Joseph Seiwert, of Wichita, Kansas, appeared for claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant had a 19 percent functional impairment and a 50 percent work disability.

The Board has considered the record and adopted the stipulations listed in the Award. During oral argument to the Board, the parties agreed that claimant's fall from the ladder at work occurred on February 8, 2008, not on February 18, 2008, as appears in some portions of the record.

ISSUES

Respondent argues that the evidence shows that claimant only suffered a scheduled injury to her right lower extremity and is, therefore, not entitled to a work disability.

Claimant asks that the Board affirm the ALJ's Award. Claimant also asserts Dr. Stein's opinion that claimant did not injure her back or left arm either in her work related

accident or as a natural consequence of that accident, invaded the province of the court and was beyond his area of expertise.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's injury and disability? In particular, did claimant suffer a scheduled injury only or is her injury to the body as a whole?

(2) Did Dr. Stein make a nonmedical determination when he found that claimant did not injure her back or left arm in her work-related accident, and if so, was it beyond the scope of his expertise?

FINDINGS OF FACT

Claimant began working for respondent in June 2004 as the manager of a retail business. On February 8, 2008, respondent was in the middle of repainting the store. Claimant was on a six-foot step-ladder painting the ceiling when a buzzer went off, indicating a customer had come into the store. As she climbed down the ladder, she fell to the floor onto her right knee. She tried to get up and fell again, but was caught by a customer before she fell to the floor. Her right knee was swollen and bleeding. The customer helped her to the front of the store, and she told him to be careful of her left arm. She fell about an hour before her shift ended, and she was able to work the rest of her shift because there were few, if any, customers.

According to claimant, she reported her injury to her area manager, Brian Wells, and he told her he did not know if respondent had insurance to cover her injuries. Mr. Wells did not testify in this case. Claimant said he told her if she did not get better in a day or two that she should go to the emergency room. Claimant said she went home, put ice on her knee, and rested. The next day, she went back to work and showed Mr. Wells her right knee and her back. Mr. Wells told her to go to the emergency room for treatment.

Claimant went to the emergency room on February 22, 2008. Claimant said when she went to the emergency room, she was asked what her biggest problem was, and she told them her knee was swollen and bleeding and she could not walk. She said she also told the personnel at the emergency room about her back and left arm. She said she had x-rays taken of her right knee and someone looked at both her back and her left arm. She was told her arm was probably just bruised from the fall. She was told to come back if she had more problems with her back. Claimant was given a brace for her right knee, given a prescription for Tramadol, and told to stay off her knee as much as possible. The emergency room records from February 22, 2008, do not show that claimant complained of problems with her back or left arm, and they also do not show her back or left arm was examined or treated.

Claimant returned to the emergency room a week later, on February 29, 2008. She said she complained to the emergency room personnel about her right knee, back and left forearm and said all three areas of the body were examined. She showed them that the bruise on her left arm was purple and starting to go away. She testified the doctor said her back was still tender from the fall. She received treatment to her right knee. The medical records of that date do not indicate that her back and left forearm were complained of or examined. Claimant said she was asked about what her main concern was, and she again told them that she was unable to walk because of her right knee. Claimant was given more pain medication, another brace for her knee, and some crutches.

Respondent sent claimant a questionnaire to fill out about her accident and injury. Claimant admits she filled out and signed the questionnaire on or about March 2, 2008. Under the question asking her to list all body parts that were hurt, claimant answered: "leg & knee." She did not mention a low back injury or an injury to her left forearm. Claimant said that was because she was not treated for anything but her leg and knee.

Claimant said she did not miss any work after the accident and, in fact, worked from 47 to 88 hours per week because respondent was short-handed. She quit the job with respondent on August 1, 2008. She said that because of the number of hours she had been required to work, she had no time to heal from her injuries.

Respondent authorized Dr. Pat Do, a board certified orthopedic surgeon, to treat claimant, and he first saw her on March 20, 2008. When he examined her, she had areas of tenderness in her knee. He diagnosed her with knee pain, possible meniscus tear. He ordered an MRI scan of her knee, which showed she did have a meniscus tear. Dr. Do performed arthroscopic surgery on claimant to repair the meniscus tear on April 25, 2008. About six weeks later, June 19, 2008, claimant told Dr. Do she was doing reasonably well. Dr. Do said claimant wanted to be released that day, so he released her from treatment. At that point, he considered her to be at maximum medical improvement. Dr. Do said neither claimant nor he felt that claimant needed any restrictions. When asked if claimant would need future medical care for her knee, Dr. Do said, "Nothing obvious."¹

Based on the AMA *Guides*,² Dr. Do said claimant had a 2 percent lower extremity impairment because of the meniscus.

Dr. Do said that his records do not indicate that claimant at any time complained of back problems. He agreed that his medical records indicate that he was only authorized to evaluate and treat claimant's right knee. Dr. Do testified, however, that although he was only authorized to treat the right knee, if claimant had complained of back pain, he would

¹ Do Depo. at 8.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

have documented the complaint and then asked for authorization to treat. He did not have an independent recollection whether claimant complained of back pain. Dr. Do agreed that the physical therapy reports of April 29, May 2, May 20, and May 23, 2008, all indicated that claimant had an antalgic gait pattern, which he described as having pain when she walked.

In her Application for Hearing filed July 29, 2008, claimant alleged suffering personal injuries from a series of accidents beginning “2/18/08 and each day worked thereafter.” She claimed the injuries were to her “right knee, left arm, back and all parts affected thereby.”³

Dr. Do performed an independent examination of claimant on November 6, 2008, at the request of respondent, at which time he found that claimant ambulated with an antalgic gait favoring the right. In questioning about the November 2008 report, Dr. Do was asked:

Q. [by claimant’s attorney] So in your opinion, in order for there to be a back injury in this case, it would have had to have occurred in the fall itself back on February 18 of 2008, is that correct?

A. [by Dr. Do] That’s what she told us, I believe.

Q. Have you ever understood that a limp or an antalgic gait such as she’s complaining of has caused back problems?

A. It can.

Q. And would that be a more likely explanation for her back pain in your opinion than that she fell off the—than she actually injured it when she fell off the ladder?

....

A. . . . If you’ve been on crutches for a long period of time and have an antalgic gait for a long period of time, that might cause back pain. If you’re telling me that you had pain when you fell, then I’m going to believe you when you say that I guess I can’t say one way or the other.

Q. Okay. Well, in this case, though, you would agree it is a possible cause of her back pain, is that correct?

A. Yes.

Q. You think that’s probably what’s the cause of her back pain?

A. I don’t know if I could say that within a reasonable degree of medical probability.

Q. Do you know what is the cause of her back pain?

A. No.⁴

Dr. Paul Stein, a board certified neurosurgeon, performed a court-ordered independent medical examination (IME) of claimant on April 17, 2009. He took a history

³ K-WC E-1, Application for Hearing filed July 29, 2008.

⁴ Do Depo. at 18-20.

from claimant and reviewed various medical records and x-rays of claimant's lower back dated September 8, 2008, that were provided to him. After his examination, he concluded that claimant had sustained an injury to her right knee in the fall at work on February 8, 2008. Using the *AMA Guides*, he rated her permanent partial disability as 2 percent to the right lower extremity for the partial medial meniscectomy she had undergone. Dr. Stein testified that he chose to use the diagnostic related estimate (DRE) as opposed to a range of motion model because he found indications of symptom magnification on the physical examination, so the DRE model was more appropriate. Dr. Stein did not rate any condition other than claimant's lower extremity. He said he found her strength to be intact in his examination. And he did not find any sign that claimant had significant atrophy of either the thigh or the calf.

Dr. Stein concluded it was possible that claimant had some low back discomfort, but she did not have an injury to the level of a functional impairment based on the fall that he could document within a reasonable degree of medical probability. In examining her left arm, Dr. Stein also found evidence of symptom magnification and sensory findings that were not likely valid. He said at the time of his evaluation, there was no evidence to document the presence of an injury to claimant's left upper extremity to the level of a functional impairment.

Dr. Stein said it would be difficult to determine if claimant had any functional impairment to the low back because the physical examination was not acceptable. He said claimant had some mild scoliosis but that would not necessarily imply a functional impairment. He noticed claimant had a right-sided limp. Dr. Stein said a substantially altered gait can, in some cases, cause some back discomfort, but in most cases it does not rise to the level of a functional impairment but is just mechanical back discomfort. He said that claimant's complaints were way out of proportion to any objective finding and her physical examination was in many respects invalid, which led to a concern regarding credibility. Concerning claimant's left arm, Dr. Stein believed an EMG/NCT testing might be helpful, as an attempt to leave no stone unturned. He did not know whether any such testing had been conducted.

Dr. Pedro Murati is board certified in physical medicine and rehabilitation, electrodiagnosis, and independent medical evaluations. At the request of claimant's attorney, he performed an examination of claimant on June 17, 2009. Claimant's chief complaints were going up and down stairs due to right knee pain, swelling and popping of the right knee, numbness and tingling in the left arm, loss of strength of the left arm, a tendency to drop things with the left hand, difficulties sitting or standing for long period of time due to pain in the low back, a burning sensation in the low back going down into the right leg, and pain during intercourse in the low back and right leg.

Claimant, when describing her accident to Dr. Murati, said she fell about six feet off a ladder and hit the floor with her right knee and left arm. She told him she experienced immediate pain in her right knee, left arm and low back.

After his examination, Dr. Murati diagnosed claimant with left contusional carpal tunnel syndrome, low back pain with signs and symptoms of radiculopathy, right SI joint dysfunction, right knee patellofemoral syndrome, status post right knee arthroscopy with partial medial meniscectomy, right knee arthroscopy with chondroplasty of patella and trochlea, and intra-articular pain injection.

Dr. Murati placed permanent work restrictions on claimant as a result of her injury. He stated that in an 8-hour day, she was to do no squatting, crawling, kneeling, using repetitive foot controls with the right, or heavy grasping with the right. She should rarely bend, crouch, stoop, climb stairs or climb ladders. She could occasionally sit, drive, and repetitively grasp. She could frequently stand, walk, and use repetitive hand controls with the right. She should not lift, carry, push or pull over 20 pounds, and that only occasionally. She could frequently lift, carry, push or pull 10 pounds. She should alternate sitting, standing and walking as needed. She should not use hooks, knives or vibratory tools with the right, and no lifting below knuckle height.

Dr. Murati opined that claimant's current diagnoses are within a reasonable medical probability a direct result of her work-related injury of February 2008, and each day working thereafter. Using the *AMA Guides*, Dr. Murati rated claimant as follows:

For left carpal tunnel syndrome, 10 percent to the left upper extremity, which converts to a 6 percent whole person impairment

For right patellofemoral syndrome, 5 percent to the right lower extremity

For atrophy of the right thigh, 5 percent of the right lower extremity

For right partial medial meniscectomy, 2 percent of the right lower extremity

The right lower extremity impairments combine for a 12 percent right lower extremity impairment, which converts to a 5 percent whole person impairment.

For low back pain secondary to radiculopathy, claimant was in the lumbosacral DRE Category III for a 10 percent whole person impairment.

The whole person impairments combined for a 19 percent impairment to the body as a whole.

Dr. Murati rated claimant with a 10 percent impairment to the low back based on radiculopathy. He agreed that claimant had no loss of reflexes, no atrophy greater than 2 centimeters, and there was no EMG testing to verify radiculopathy. She did not have any compression fractures between 25 and 50 percent compression. She did not have any posterior element fractures. Dr. Murati testified that he rated the weakness and sensory findings of radiculopathy, which came up to a 10 percent rating. Dr. Murati testified that an antalgic gait can lead to back problems. His examination of claimant's pelvic brim showed that her hips were abnormal. The left was rotated forward, and the right hip was hiked, so that probably placed an extra amount of stress on her back. Dr. Murati said that claimant gave him a history of having back problems from the date of the accident forward.

Dr. Murati rated claimant with a 10 percent impairment to the left arm for a mild case of carpal tunnel. He had no EMG findings to confirm his diagnosis of carpal tunnel. Dr. Murati agreed that the emergency room reports of February 22, 2008, and February 29, 2008, do not indicate an injury to any area other than claimant's lower extremity, nor did any doctor do any evaluation or diagnostic testing of the left arm or low back.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d(a) states in part:

Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

....
(12) For the loss of a forearm, 200 weeks.

....
(16) For the loss of a leg, 200 weeks.

....
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

Without citing any specific question and answer or referencing any page of the deposition transcript, claimant, in her brief, argues that Dr. Stein offers a causation opinion or opinions that are not medical opinions but instead are determinations that invade the province of the court. Dr. Stein's seven-page report of his April 17, 2009, examination of claimant was admitted without objection.⁵ During his deposition testimony, Dr. Stein was asked for his opinions about whether claimant sustained injuries to her right knee, back and left arm. He answered those questions and gave his opinions regarding causation without objection. In fact, not a single objection was lodged at any time during Dr. Stein's deposition by either party. The ALJ did not rule on any objections in her Award. The objection claimant is raising to the Board in this appeal is out of time.

Claimant has failed to prove that she injured either her left arm or her low back as a result of her fall on February 8, 2008. She may have some low back discomfort resulting from her right knee injury and antalgic gait, but she has failed to prove that her low back condition has resulted in any rateable permanent impairment of function. In this instance, the Board finds the opinions of the treating physician, Dr. Do, and the court-ordered IME physician, Dr. Stein, to be more credible than the opinions of Dr. Murati, who was hired by claimant. In addition, the Board finds the absence of low back and left arm complaints in

⁵ Stein Depo. at 9.

the contemporaneous medical records to be more persuasive than the testimony of claimant on the question of whether claimant suffered injury to those body parts in her fall.

CONCLUSION

(1) Claimant sustained a 2 percent permanent impairment of function to her right leg as a result of her fall at work on February 8, 2008.

(2) The objections concerning Dr. Stein's opinions are overruled.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated April 8, 2010, is modified to find that claimant has a 2 percent permanent partial impairment of function to her right lower extremity at the level of the leg.

Claimant is entitled 4 weeks of permanent partial disability compensation, at the rate of \$320.76 per week, in the amount of \$1,283.04 for a 2 percent loss of use of the right leg, making a total award of \$1,283.04, minus the amount of \$866.66 paid to claimant by respondent as an advance, making the amount due to claimant \$416.38, less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of August, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge